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The EU-UK Trade and Cooperation Agreement – the ‘Level Playing Field’

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On 24 December 2020, the European Union and the UK Government reached an agreement on the terms of their future cooperation, known as the EU-UK Trade and Cooperation Agreement.

The Trade and Cooperation Agreement is a single package comprising:

- General and institutional arrangements;
- Economic provisions, including on trade and ‘level playing field’ guarantees;
- Law enforcement and judicial cooperation in criminal and civil law matters; and
- Provisions on dispute settlements, basic values and safeguard measures.

The Agreement comes after months of intense negotiations. Among the most contentious aspects under discussion were the rules around the ‘level playing field’ (i.e., the internal market, competition and, in particular, State aid rules). Under the terms of the Trade and Cooperation Agreement, both sides have now agreed to:

- Maintain a competition law framework that deals with anti-competitive agreements and concerted practices, abuse of dominance as well as merger control;
- Put in place an independent system of subsidy control; and
- Have effective tools and mechanisms for the enforcement of the ‘level playing field’ commitments in the Agreement.

On 30 December 2020, the president of the European Commission, the president of the European Council and the UK prime minister signed the Trade and Cooperation Agreement. On the same day, the UK Parliament approved it. The Agreement will be provisionally applicable from 1 January 2021, pending the consent of the European Parliament and conclusion by the Council’s decision.

In this alert, we consider the implications for competition law and State aid.

Formal and procedural aspects

Comprising 1,246 pages, the Trade and Cooperation Agreement is a complex document representing the outcome of lengthy discussions that formally commenced on 2 March 2020.[1] It follows the 2019 EU-UK Withdrawal Agreement, which entered into force on 1 February 2020, to regulate the UK’s orderly withdrawal from the EU – in particular, the transition period between 1 February 2020 and 31 December 2020.

The ‘level playing field’ and competition policy

UK competition law mirrors to a great extent EU competition law and no significant changes are anticipated in the Trade and Cooperation Agreement. Whilst a slightly different terminology is used in places, the common principles appear largely the same as under the existing EU competition law. Both the EU and the UK recognise ‘the importance of free and undistorted competition in their trade and investment relations’ and the fact that ‘anticompetitive business practices may distort the proper functioning of markets and undermine the benefits of trade liberalisation’.[2]

Under the Trade and Cooperation Agreement, each side commits to maintaining an effective system of competition law to address anticompetitive agreements, abuse of dominance and merger control. Such a competition law framework will include the maintenance of an independent competition authority, as well as a

transparent and non-discriminatory enforcement regime guaranteeing defence rights to companies involved, irrespective of their nationality or ownership status.

In addition, the EU and UK competition authorities may enter into a separate agreement in order to cooperate and coordinate on proceedings in relation to the same or related conduct or transactions. A separate agreement between the European Commission, the competition authorities of individual Member States, and the UK Competition and Markets Authority (CMA) is envisaged.

Overall, in terms of competition policy, the Trade and Cooperation Agreement appears to be in line with the previously announced setup, with no substantive changes to the existing UK competition law framework – apart from the fact that EU law (including case law) from 1 January 2021 cease to apply to the UK. See our Cooley alert for more details on the impact to UK competition law (and the specific regime for on-going competition cases).

The 'level playing field' and State aid policy

State aid was reportedly one of the most contentious issues during the negotiations between the EU and the UK. Originally, EU State aid rules were intended to be transposed into UK law as retained EU law. That intention was subsequently abandoned and, on 9 September 2020, the UK Government announced that from 2021 it would follow the World Trade Organization's subsidy rules.[3] With the signing of the Trade and Cooperation Agreement, the UK Government has finally agreed to a detailed framework for subsidy control that covers both substantive and enforcement aspects.

Substantive rules

The Trade and Cooperation Agreement mandates that each party must have in place and maintain 'an effective system of subsidy control'[4] and that it is up to each of them to determine how this will be implemented into domestic law.[5] This means that, while the UK must adopt a subsidy regime, it is free to set up its own rules without being bound to EU law and to the European Court of Justice. Nonetheless, the Agreement provides a legal framework that both sides must follow. In particular, the concept of 'subsidy' is defined as financial assistance that involves:

- State resources;
- Economic advantage conferred to one or more economic operators;
- Specificity of such advantage (i.e., benefits to certain companies over others); and
- An effect on trade or investment between the parties.

While the terminology is different, such a test appears to be inspired by the concept of State aid under EU law.

The Agreement states that 'subsidies are not granted where they have or could have a material effect on trade or investment between the Parties'.[6] At the same time, the Agreement indicates the principles that subsidies need to comply with to be conceded:

- A contribution to a well-defined objective of public interest (e.g., green transition);
- A need for state intervention to remedy a market failure (e.g., guaranteeing transport service to remote areas);
- Proportionality (i.e., the subsidy should be limited to what is necessary to achieve the objective);
- Appropriateness (i.e., no other measure would reach the same effect);
- Subsidies are designed to bring about a change in the economic behaviour of the beneficiary that is conducive to reaching the objective and that would not be achieved otherwise (i.e., incentive effect);
- An exclusion of compensation for costs that the beneficiary would have funded in the absence of any subsidy; and
- The subsidy's positive impact must outweigh any negative effects, and considers the impact on trade between the EU and the UK.

Additional binding rules apply for certain sectors (e.g., in relation to air transport, it is possible to grant subsidies to fulfil a public service obligation) or specific types of aid (e.g., rescue subsidies cannot be given in the absence of a credible restructuring plan).

Alongside the Trade and Cooperation Agreement, both sides have agreed to a series of joint declarations covering various policy areas with helpful indications and political statements on these themes. In particular, the Joint Declaration on Subsidy Control Policies provides nonbinding guidelines for supporting disadvantaged areas, transport and research and development.[7]

Both sides also agreed to a transparency mechanism, which will involve publishing information on the subsidy's legal basis and objective, the beneficiary of the subsidy and the date when it was granted, as well as the actual amount, within six months from the granting or within one year for subsidies in the form of tax measures.

Enforcement

The Trade and Cooperation Agreement guarantees enforcement at two levels: domestically, within each side's subsidy control system, and internationally (i.e., under the specific mechanisms in the Agreement).

Domestic courts will be competent to review subsidies and their compatibility with the principles under the Agreement and to impose remedies, if necessary, including recovery.[8] This will allow competitors to challenge subsidies deemed outside the scope of the rules.

Internationally, the EU and the UK may solve conflicts by means of two instruments:

- Under the general horizontal dispute settlement mechanism regulated in Part Six of the Trade and Cooperation Agreement, each side may submit a conflict regarding the interpretation and application of various sections of the Agreement, including certain provisions on subsidy control. This may lead to arbitration, with non-compliance potentially resulting in sanctions, such as the suspension of the commitments under the Agreement (e.g., the introduction of tariffs or quotas on goods or other market barriers).
- Alternatively, the parties may adopt unilateral remedial measures (e.g., again, tariffs or quotas) if a subsidy causes (or risks to cause) 'a significant negative effect on trade or investments' between them.[9] The assessment of the existence of a subsidy and a significant negative effect should be based 'on reliable evidence and not merely on conjecture or remote possibility'.[10] As above, this may result in arbitration. In these circumstances, the 'significant negative effect' test will play a key role. The Trade and Cooperation Agreement states that the Partnership Council – a collaborative body supervising the implementation of the Agreement – will maintain an illustrative list of what is considered to meet such a threshold.[11]

Northern Ireland

It is important to note that, while these subsidy rules will apply to the territory of Great Britain, from 1 January 2021 to 31 December 2024[12], Northern Ireland will be subject to the State aid provisions contained in the Protocol on Ireland and Northern Ireland in the EU-UK Withdrawal Agreement, i.e., EU law enforced by the European Commission and reviewed by the European Court of Justice. In particular, EU State aid rules will continue to apply to the UK in respect of measures that impact trade between Northern Ireland and the EU.

On 18 January 2021, the European Commission published a notice on State aid and the UK's departure from the EU, with reference to the situation in Northern Ireland.[13] Under the terms of the notice, in order for an aid measure to have an effect on trade between Northern Ireland and the EU, 'the beneficiary does not necessarily need to be located in the EU Member States or in Northern Ireland, nor does the beneficiary necessarily need to be directly involved in trade between Northern Ireland and the Union'. Such a position seems at odds with the UK Government's guidance on its international subsidy control commitments, which provides that subsidies granted in Great Britain are captured by the Protocol on Ireland and Northern Ireland, i.e. the EU State aid rules 'where there is a clear benefit from and a genuine, direct link between the subsidy and companies in Northern Ireland.'[14] These diverging views will undoubtedly create some uncertainty about how to apply the EU State aid rules under the Protocol on Ireland and Northern Ireland.

Conclusion

Compared to other free trade agreements concluded by the EU, the Trade and Cooperation Agreement is unique, especially regarding the 'level playing field'. For instance, the EU-Canada Comprehensive Economic and Trade Agreement largely relies on WTO rules when it comes to subsidies.[15] This is quite different from the text

of the Trade and Cooperation Agreement, which contains a detailed set of rules.

Nonetheless, with regard to subsidies, the UK will enjoy considerable flexibility to set up its own regime. It is not required to follow EU procedures or to establish an ex-ante approval system (i.e., notification is not required before subsidies are granted), unlike the present EU regime. However, many questions remain unanswered. For example, the Agreement mandates the creation of an independent authority 'with an appropriate role in its subsidy control regime,'[16] without specifying its competence, nor is it clear which body will oversee the subsidy regime in the UK. In 2019, the Theresa May Government suggested that the CMA would be the State aid enforcement authority. Various experts also suggested that the CMA would be best placed to oversee the UK subsidy regime,[17] but this has not yet been confirmed.

Notes

1. A copy of the Agreement (draft version), as well as of the accompanying documentation, was made available on 26 December 2020. This alert has been drafted on the basis of such documentation.
2. Art. 2.1 of the EU-UK Trade and Cooperation Agreement.
3. Department for Business, Energy & Industrial Strategy Press Release, 'Government sets out plans for new approach to subsidy control', 9 September 2020.
4. Art. 3.4(1) of the EU-UK Trade and Cooperation Agreement.
5. Art. 3.4(3) of the EU-UK Trade and Cooperation Agreement.
6. Art. 3.4(1) of the EU-UK Trade and Cooperation Agreement.
7. Declarations, Joint Declaration on Subsidy Control Policies, p. 5.
8. Art. 3(10) of the EU-UK Trade and Cooperation Agreement.
9. Art. 3.12(1) of the EU-UK Trade and Cooperation Agreement.
10. Art. 3.12(6) of the EU-UK Trade and Cooperation Agreement.
11. Art. 3.12(7) of the EU-UK Trade and Cooperation Agreement.
12. Following such date, Articles 5 to 10 of the Protocol, including State aid, will be applicable only subject to Northern Ireland's democratic consent.
13. European Commission, Notice to Stakeholder Withdrawal of the United Kingdom and EU Rules in the Field of State Aid, 18 January 2021.
14. Department for Business, Energy & Industrial Strategy, Technical guidance on the UK's international subsidy control commitments, 31 December 2020.
15. See of the EU–Canada Comprehensive Economic and Trade Agreement.
16. Art. 3.9(1) of the EU-UK Trade and Cooperation Agreement.
17. House of Commons Briefing Paper, 'UK subsidy policy: first steps', p. 41.

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